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American Petroleum Institute Comments on MMS Proposed Policy for Release of Third-Party Proprietary Information, 30 CFR Part 243, 62 FR 16116 (April 4, 1997)

Dear Mr. Guzy:

API welcomes the opportunity to offer written comments on the MMS' April 4, 1997 proposal ("MMS Proposal") for release of third-party proprietary information. API's over 350 member companies represent all aspects of the petroleum industry: exploration, production, transportation, refining and marketing. These activities generate large amounts of proprietary information which API's members routinely submit to the MMS. As participants in a highly competitive industry, our members have a significant interest in this rulemaking which affects MMS handling of that information.

At 62 FR 16117, the MMS Proposal cites with approval Chrysler v. Brown, 441 US 281(1979). In Chrysler, the Supreme Court, dealing with a Freedom of Information Act issue, emphasizes the need to balance the interests in protecting information with the interests in disclosing information. Chrysler at 441 US 293, note 12. Our specific comments address both sides of the tension. In some respects, the MMS Proposal fails to provide the submitters of proprietary information with adequate protection against release of proprietary information. In other respects, the MMS Proposal fails to satisfy the need to release data to permit fair and reasonable participation in the appeals process. Our comments also identify certain operating details of the process contemplated by the MMS Proposal that should be modified.

To the specific comments which follow we would add one overarching observation. We concur that the prohibitions of the Trade Secrets Act are not absolute and that release of proprietary information may be "authorized by law," e.g., by promulgation of MMS regulations. However, such regulations must satisfy all applicable

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administrative procedure requirements and are themselves subject to judicial review. Among other things, this means that MMS regulations must have a sound basis in the administrative record to avert any "arbitrary and capricious" flaw.

Insufficient Protection of Proprietary Data

In the preamble to the proposal, the MMS states that it "believes that commercial or financial information less than 6 years old concerning the volume and value of the produced substance" is privileged or confidential. MMS Proposal at 62 FR 16117. However, the MMS offers no rationale for this rule of thumb nor is it reflected in the proposed regulatory language. Furthermore, the 6-year period does not square with the 10-year rule of thumb the MMS customarily uses in connection with Freedom of Information Act requests. Accordingly, API urges the MMS to state in the preamble to the final rule that 10 years, not 6 years is the rule of thumb.

Under **§ 243.17**, several obligations and restrictions would be imposed on the use of relevant proprietary information ("RPI") released by the MMS. For example, under **§243.17(a)**, the RPI may be used only for evaluating and challenging the relevant order. Under **§ 243.17(b)(1)**, reviewers are limited to only "counsel and persons directly assisting your counsel in preparing the relevant appeal." Under **§ 243.17(c)(1)**, any person reviewing RPI documents must also certify that they have read and understand the confidentiality and liability agreements. Under **§ 243.17(f)**, the front of any appeals document must state if it contains RPI. Under **§ 243.17(g)**, all RPI documents must be returned. API supports retention of all of these obligations and restrictions. However, since some information is so highly proprietary (e.g., very recent data, contract information, pricing formulas, etc.), the MMS should amend **§ 243.17** to include at least three additional provisions.

First, **§ 243.17** should expressly provide that the submitter of the RPI requested be notified in all cases, consistent with the MMS' own view of Executive Order 12600 and existing proprietary information regulations at 43 CFR 2.15(d). See MMS Proposal at 16117.

Second, the MMS should amend **§ 243.17**, or add preamble language, to identify at least two alternatives to release of the RPI itself. Where more than one source of RPI is involved, the MMS should provide for release of aggregated data that deletes the submitters' names and other identifying characteristics. See Continental Oil v. FPC, 519 F.2d 31, 36 (5th Cir.). Where only one party's RPI is involved, or aggregation would not mask the submitter of the data, the MMS should provide for release of summary information prepared by a neutral third party. Such measures, employed on a case-by-case basis, could ameliorate the possibility of disclosure to the submitter's competitors, actual or potential. However, the MMS should recognize that information already available to the public concerning the makeup of the industry, especially in a particular producing area, could be used to identify the submitter, even if

such protective measures are employed. See Mudge Rose Guthrie Alexander & Ferdon v. US ITC, 846 F.2d 1527,1531 (DC Cir. 1988) and Church of Scientology of CA v. IRS, 792 F.2d 153, 160 (DC Cir. 1986).

Third, every person having access to the RPI should be required to execute a confidentiality and liability agreement to avoid any inference that responsibilities and obligations vary among persons having access to the RPI.

Undue Limitations on Release of Proprietary Data

Under **§ 243.11(a)**, a request for RPI seems limited to information the MMS regards as forming the basis of the order on appeal. The MMS should eliminate this limitation because it unduly limits disclosure of relevant third party proprietary information which may extend beyond the information on which the MMS claims the order on appeal was "based" (e.g., information that should have been considered). In addition, the appellant has no way of knowing beforehand what information the MMS has in its files and should not be limited to information which the MMS alone adjudges is relevant to the order. See also comments on **§ 243.18** below. Absent these changes, the MMS alone would determine the scope of the record and have an undue advantage in the proceeding.

Under **§ 243.11(c)**, a party in an appeal may request RPI only until expiration of the time to file a Statement of Reasons. The MMS Proposal offers no rationale for this deadline and, inasmuch as prosecution of an appeal may surface previously unknown information that could be of relevance to the issue on appeal, it should be eliminated.

Under **§ 243.12(b)(1)**, a party requesting information must identify the relevant proprietary information. However, since a party may not know the identity of the information, it should be sufficient to request all relevant proprietary RPI germane to the MMS decision under appeal.

Under **§ 243.12(b)(3)**, a party requesting information must also identify any existing confidentiality and liability agreements that exist. Given the short time available for making RPI requests, the MMS should delete this requirement or at least amend it to clarify that the requesting party need not undertake a full search of its files to identify any such agreements as a precondition for the RPI request.

Under **§ 243.13**, several grounds for denial of an RPI request are identified: "not relevant proprietary information", "received after the timeframes outlined", "breached a previous . . . agreement", "for other good cause." However, these provisions are far too sweeping. For example, even if a request is received outside an applicable timeframe, it should be granted if good cause is shown. Likewise, the RPI requested may not itself be relevant or proprietary, but could lead to information that is relevant, whether or not it

is proprietary. Accordingly, the MMS should amend this section to narrow and clarify the unduly broad bases for denial of an RPI request.

Under **§ 243.18**, the MMS may impose "more stringent standards" to preserve confidentiality in some cases. Although the MMS needs discretion to handle special situations, the MMS should amend this provision to clarify the grounds for imposition of extra limitations to avoid MMS imposition of unreasonable limitations.

Miscellaneous Operating Details

Under **§ 243.10**, "proprietary information" is defined as "commercial or financial information obtained from a third party and privileged or confidential." However, the key term "confidential" is itself nowhere defined. Indeed, the preamble to the MMS Proposal acknowledges that it needs guidance on this issue.

Under **§ 243.14**, a party may appeal an MMS denial or file a Supplemental Statement of Reasons, if the MMS denial occurs after the deadline for filing a Statement of Reasons. However, the MMS should amend the proposal to extend the deadline for filing a Statement of Reasons for a reasonable period of time after the MMS acts on an RPI request, whether the request is granted or denied.

Under **§ 243.15(a)**, a company CEO or equivalent official must sign any confidentiality or liability agreement. The MMS should revise this unduly limited and impracticable provision to allow any person with authority to bind the corporation to sign the agreement.

Under **§ 243.16**, a party requesting RPI must pay the MMS' administrative costs of providing RPI. The MMS should eliminate this provision. Unlike an ordinary Freedom of Information Act request, the RPI requests addressed in this rulemaking occur in the context of an appeal of an order issued by the MMS. Moreover, the allusion to the costs of "researching" is particularly puzzling since the MMS presumably has already identified and segregated the information on which the order on appeal is based. In litigation, parties do not bill one another for the cost of complying with discovery, although they may, of course, contest the scope of discovery. The same model should apply here.

Under **§ 243.20**, a party holding RPI released by the MMS must return the material within 60 days of a final decision of the Department. The MMS should amend this provision to allow retention for the duration of any subsequent court litigation challenging the final decision of the Department. In addition, the MMS should amend this provision to allow, at least in some circumstances, destruction of the RPI as an alternative. If destruction were permitted, protection of the RPI could be assured by requiring that the party procure the concurrence of the submitter and certify its destruction.

Finally, the MMS should consider adding an appendix to its RPI regulation, prescribing the presumptive terms of acceptable confidentiality and liability agreements, with exceptions available only upon a showing of special circumstances.

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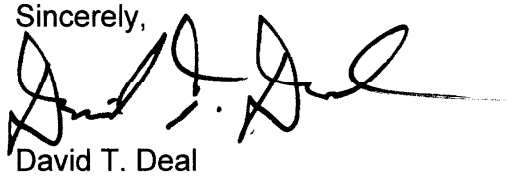
API urges the MMS to amend its April 4, 1997 proposal along the lines of the above comments. Should you have any questions, we would welcome the opportunity to meet with you and provide further information.

Sincerely,



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